

Internal deliberative pre-decisional

# WATER QUALITY STANDARDS

## ISSUE SUMMARY:

States, Territories, and authorized Tribes establish water quality standards (WQS) for surface waters under Clean Water Act (CWA) Section 303 to protect aquatic life, other wildlife, and human health effects related to swimming, fishing, boating, or use as a source of drinking water or irrigation. EPA has oversight authority to review and either approve or disapprove these standards, and authority to establish federal WQS if necessary, with specific deadlines established under federal law. Citizens may challenge EPA actions or inaction. There are several ongoing legal cases arising from EPA approval and disapproval actions, and there are several federal WQS rules currently in process. These challenges and actions raise issues related to the type and degree of aquatic life and human health protection that must be provided under the CWA and typically involve input and direction from senior leaders in the Agency.

## UPCOMING MILESTONES:

- **Oregon Aluminum:** EPA is under a consent decree to finalize aluminum criteria for fresh waters in Oregon by December 31, 2020.
- **New York Bacterial Pathogens:** EPA is aiming to propose federal criteria by approximately March 2021.

**Commented [WA1]:** Why is this so late? If we get it to OMB later this month, we should be able to propose in January, right?

## BACKGROUND:

WQS are principally comprised of designated uses (e.g., swimming and fishing) and criteria to protect those uses, as well as antidegradation policies and procedures. Criteria are expressions of water quality attributes and can be expressed as a narrative criteria or, often established as specific numeric pollutant levels to be avoided. WQS form a legal basis for controlling pollutants entering the waters of the United States. Under the CWA Section 303(c)(3), EPA has 60 days to review and approve and 90 days to review and disapprove a state or tribal WQS submission for review. If EPA disapproves, states/tribes have 90 days to remedy the situation disapproval. If the state/tribe does not remedy the disapproval, after which EPA must "promptly propose" (see CWA Section 303(c)(4)) propose a federal WQS rule to replace the disapproved state/tribal rule. Under the Administrative Procedures Act, EPA has 90 days after proposal to promulgate a final rule. In practice, these deadlines are sometimes exceeded, leaving the Agency vulnerable to legal challenges. If a state remedies the situation disapproval that necessitated a the federal rule, EPA typically withdraws the federal rule. If EPA approves a WQS related to aquatic life or other wildlife protection, or if EPA promulgates criteria for protecting aquatic life or other wildlife, the Agency is also obligated to consult with relevant federal agencies to ensure appropriate protection under the Endangered Species Act (ESA). Federal WQS rulemakings currently in process include:

- **Federal Aluminum Aquatic Life Criteria Applicable to Fresh Waters in Oregon:** EPA is under a consent decree to promulgate a final rule by December 31, 2020, to establish criteria for fresh waters in Oregon to protect aquatic life from harmful levels of aluminum. EPA disapproved Oregon's freshwater aluminum criteria in 2013, and then was sued to take action promulgate a federal replacement. Oregon does not intend to initiate state rulemaking to adopt their own aluminum criteria before the federal criteria are promulgated.

**Commented [WA2]:** Shouldn't this be resolved by the time anyone will review these transition papers?

- **Federal Recreational Water Quality Criteria Applicable to Certain Waters in New York:** EPA is moving to propose federal criteria for bacterial pathogens to protect for swimming in certain marine waters in the vicinity of New York City with a target date of March 1, 2021. In 2017, EPA approved New York's action to designate these waters for ~~swimming~~ primary contact recreation (e.g., swimming), and in 2018 EPA disapproved the ~~associated criteria New York promulgated because they do not protect swimming~~ primary contact recreation, ~~but instead protect secondary contact recreation (e.g., boating).~~ New York subsequently equivocated on whether they, in fact, ~~did designate established primary contact recreation as the designated use for these waters~~ swimming, but has not submitted anything to EPA to justify this position. There is ongoing litigation to force EPA to promulgate protective federal criteria for New York. ~~EPA is moving to propose federal criteria to help avoid a Court ruling to propose and promulgate with very tight deadlines, and to hopefully spur more definitive action from the State. Because of the high volume of combined sewer overflows in New York City, the cost of safely protecting swimming at all times is very high, and the State needs to explain their constraints in a WQS annex.~~

Commented [WA3]: Same question above

- **Withdrawal of Certain Federal Water Quality Criteria Applicable to Maine:** On December 19, 2016, EPA published final [ HYPERLINK "https://www.epa.gov/wqs-tech/proposed-rule-maine-water-quality-standards" ] jurisdiction after disapproving certain criteria in 2015 because ~~EPA determined at that time that they did not sufficiently protect some designated uses. EPA proposed withdrawing federal human health criteria (HHC) on September 3, 2020 because EPA approved State-adopted human health criteria (HHC) on June 23, 2020 and has proposed withdrawing its federal HHC.~~ EPA anticipates a final rule withdrawing the federal HHC in early 2021.
- **Final California Statewide Aquatic Life/Wildlife Criteria for Selenium:** EPA is under a consent decree to promulgate a final rule to establish federal criteria to protect aquatic life and aquatic-dependent wildlife from harmful exposure to selenium within six months of completing ESA consultation with the U.S. Fish and Wildlife Service and the U.S. National Marine Fisheries Service (collectively, the Services). EPA intends to transmit a Biological Evaluation to the Services in February/March 2021, with a target date of October 2021 for the final rule. California does not intend to initiate state rulemaking to adopt their own selenium criteria before the federal criteria are promulgated.

#### KEY EXTERNAL STAKEHOLDERS:

- ☒ Congress
 ☒ Industry
 ☒ States
 ☒ Tribes
 ☐ Media
 ☒ Other Federal Agency  
☒ NGO
 ☐ Local Governments
 ☐ Other (name of stakeholder) \_\_\_\_\_

#### Ongoing WQS litigation:

- **Missouri Lakes Numeric Nutrient Criteria Litigation:** On December 3, 2019, an advocacy group challenged EPA's approval of the State's nutrient water quality criteria for lakes as arbitrary and capricious, arguing the criteria do not protect ~~sensitive~~ recreational and drinking water supply uses among other complaints. EPA is in the process of defending the approval action.
- **Montana Nutrient Variance Litigation:** In 2019, EPA partially lost a challenge to its 2017 approval of WQS variances in Montana, which are allowances for dischargers to meet less stringent permit limits than would

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otherwise be necessary to meet criteria for nutrients. EPA is currently appealing this decision. Separately, the same plaintiff is challenging EPA's 2020 approval of a provision that allows the State to ~~void adoption of revised~~ its nutrient criteria by operation of law because the variances are not in place effect. EPA is in the process of defending this action.

- **Idaho Multi-Claim Litigation:** After years of protracted litigation on CWA and ESA-related complaints, a single claim of failure to propose and promulgate federal criteria in response to EPA's 2008 disapproval of Idaho's revised mercury criteria to protect aquatic life remains active in this case. Idaho retains mercury criteria to protect human health, which is thought to be a more sensitive endpoint than aquatic life. EPA is in the process of defending its inaction.
- **Washington HHC:** The State of Washington challenged EPA's 2019 ~~reversal-reconsideration of a 2016 partial~~ disapproval decision ~~to an approval~~. EPA's subsequent approval of Washington's water quality standards, and EPA's withdrawal of a the federal water quality standards it promulgated rule establishing federal HHC in response to the its partial disapproval. At stake is the degree of flexibility EPA has to reverse its WQS actions. Parties have completed briefing the initial complaint and are awaiting a decision.
- **Oregon ESA/CWA Litigation:** In 2018, ~~one of the parties who brought the Idaho challenges described above~~ litigant challenged both EPA and the U.S. Fish and Wildlife Service (FWS) that EPA's 2013 and 2014 approvals of water quality criteria for arsenic, selenium, and zinc were arbitrary and capricious and that both agencies failed to protect listed endangered species. The agencies are in the process of defending their actions.
- **Washington Aquatic Life Criteria Petition Denial Litigation:** On September 16, 2020, ~~the same party as above for the Oregon matter~~ litigant challenged EPA's denial of a petition for EPA "to update the State of Washington's water quality standards for the protection of ... aquatic life from toxic contaminants" arguing, among other things, that the denial was not based on sound scientific rationale. The Agency will need to conduct internal discussions to decide on a path forward in this matter.

Commented [WA4]: What does this mean?

#### MOVING FORWARD:

- **New York Water Quality Standards Litigation:** September 30, 2020 (Plaintiffs' reply brief); October 30, 2020 (EPA and intervenor-defendants' reply briefs).
- **Oregon Aluminum:** Finalize federal criteria rule by December 31, 2020.
- **California Selenium Statewide:** Transmit a Biological Evaluation to the Services in February/March 2021. Finalize federal criteria rule by approximately October 2021.
- **Idaho Multi-Claim Litigation (remaining mercury claim):** September 25, 2020 (Plaintiffs' summary judgment motion); October 30, 2020 (EPA's cross-motion for summary judgment and response to Plaintiffs' motion); November 13, 2020 (Plaintiffs' reply brief); December 4, 2020 (EPA's reply brief).
- **Oregon ESA/CWA Litigation:** October 23, 2020 (Plaintiff's summary judgment motion); December 11, 2020 (EPA's cross-motion for summary judgment); January 29, 2021 (Plaintiff's reply brief); March 10, 2021 (EPA's reply brief).
- **Missouri Lakes Numeric Nutrient Criteria Litigation:** September 25, 2020 (Plaintiff's Brief in Support of Motion for Summary); November 10, 2020 (EPA's Opposition Brief and Cross-Motion for Summary Judgment); November 30, 2020 (MCE's Reply and Opposition to Cross Motion); January 15, 2021 (EPA's Reply Brief).
- **Montana Nutrient Variance Litigation:** September 21, 2020 (EPA third brief on cross appeals); September 24, 2020 (oral arguments on non-severability)

LEAD OFFICE/REGION: OW

OTHER KEY OFFICES/REGIONS: OGC, REGIONS

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